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A Resource From Montgomery County's Office of the County Attorney

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Recycling Enforcement Efforts to Increase

Susan B. Squires

Recyclables must be kept separate from refuse from the time they become waste through their collection and ultimate disposal. And just what are "recyclables?" The Code lists those items which qualify as "recyclables" (*see* 48-46 (a), (b)), including a provision that allows the Executive to change or expand that list by regulation (48-46 (c)). Residential recyclables are processed at the County's Materials Recycling Facility, while refuse is taken to the Transfer Station and, ultimately, to the County's Resource Recovery Facility in Dickerson, where it is burned to generate electricity.

The regulations complement the Code and are designed to hold responsible each person who generates or collects solid waste for disposal. Residents must separate trash from recyclables and keep them separate for

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The Wal-Mart Bill

Amy Moskowitz

Last year, the Maryland General Assembly passed the Fair Share Health Act, a law requiring employers with over 10,000 employees to spend at least 8% of their Maryland payroll on health care. (Governments are excluded.) Those companies that spend less would have to pay the difference into a newly created public fund that would be used to pay Medicaid costs. However, Governor Ehrlich vetoed the bill last year. Early this year, as one of its first actions, the General Assembly overrode Governor Ehrlich's veto and the Fair Share Health Act became law. This law has been nicknamed "the Wal-Mart bill" because Wal-Mart is the only employer with over 10,000 employees that does not spend the requisite amount on health care. In addition, many Wal-Mart employees receive health care benefits through Medicaid.

On February 7, the Retail Leaders Association, of which Wal-Mart is a member, filed a law suit challenging this law on the basis that the Employees Retirement Income Security Act (ERISA), a federal law, preempts this State law.

Under ERISA, enacted in 1974, any State law which "relates to" employee benefit plans is preempted. The intent of ERISA was to protect employers with employees in different states from being subject to providing different benefits in each state. Arguably, the Fair Share Health Act is preempted by ERISA because it affects plans by essentially requiring employers to modify or otherwise change health plans in order to be in compliance. For example, while Wal-Mart does offer a plan, in order to comply with the Fair Share Health Act, it has to modify its plan.

In defending the law, Maryland Attorney General, Joseph Curran, argues that, unless State law specifically

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pickup. Businesses must have and carry out recycling plans, including having sufficient approved containers in appropriate places for pickup. Collectors must not mix recyclables with trash, must not dispose of recyclables at the Transfer Station, and must notify customers and the County of their customers' transgressions. Collectors must also carry customer lists and service locations with each load and produce them to County staff upon demand. Failure to do any of these tasks can result in a citation.

Two other Code provisions are worth noting: fines collected must be paid into the solid waste collection and disposal fund (48-49 (b)) and each container holding recyclable solid waste which is collected or disposed of in violation of the Article or regulations can constitute a separate violation (48-49(a)). Violations are Class B violations, carrying an initial fine of \$100 and \$150 for each offense thereafter. ❖

Montgomery County Code, Article V, Sections 48-45 to 48-51, for recycling requirements

COMCOR 48.00.03 and 48.00.05, for regulations

**Hiring Workers***continued from page 1*

dictates the kinds of benefits the employer must provide, the law will not be pre-empted by ERISA. The Fair Share Health Care Act does not require employers to establish a plan or dictate what kinds of benefits must be available, only that a company must spend a certain amount of payroll on health expenses. Curran also partly relies on a 1995 Supreme Court decision, which arguably gives states more control in regulating employee benefits. Stay tuned for further developments.

Similar legislation is now being considered in many other States. ❖

Is the Promise Binding or Illusory?

Richard H. Melnick

Maryland courts favor the enforceability of agreements that abide by contract principles. This includes agreements between parties to arbitrate disputes.

Many times, a contract's enforceability is decided by the existence of consideration, which is established through evidence of a bargained-for benefit or detriment to a party. A party's obligation in making that promise must be binding, to constitute consideration necessary for a legally enforceable agreement. Accordingly, a promise that is not binding – an “illusory promise” – is insufficient consideration to allow a party to enforce a contract.

The Maryland Court of Appeals recently upheld the enforceability of an arbitration agreement. La'Tia Holloman signed an agreement to arbitrate employment disputes, as a condition to being considered for employment with Circuit City Stores, Inc. Circuit City hired Holloman, who then terminated the employment relationship and brought a six-count sexual harassment action in court. When Circuit City sought to compel arbitration under the agreement, Holloman claimed that the agreement was invalid.

Holloman contended the agreement contained an illusory promise, because Circuit City could alter the arbitration agreement on the 365th day of the year (effective the following day), after giving 30 days' notice. Holloman relied on cases that found a lack of consideration where a party retained unfettered discretion to alter the agreement without notice or consent.

The Court of Appeals found that: (1) the agreement gave Holloman the opportunity to arbitrate under its terms, without fear of rescission or modification by Circuit City; and (2) any modification would (a) occur only with notice and (b) be effective only at the beginning of the following year. The court found these limitations on Circuit City's discretion to create a binding obligation that constitutes consideration for an enforceable arbitration agreement. The court also held

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ADA's "Essential Functions" Requirement Reviewed

Bernadette Lamson

On February 22, 2006, the U.S. District Court of Maryland issued an employer-friendly decision in which it discusses the Americans with Disabilities Act's (ADA) "essential functions" requirement with regard to offering an employee a reasonable accommodation.

When Baltimore City faced 5% of its police force (169 officers) not being eligible for full duty, due to chronic illness or permanent injuries, it changed its policy for allowing police officers to remain in "light duty" positions. In March 2005, Baltimore City and the police union adopted a policy requiring a disabled officer to apply for disability retirement under certain salary conditions. Six disabled officers challenged the mandatory retirement policy, claiming that it violated the ADA. The officers claimed that they were qualified to work as police officers because they could perform the "essential functions" of the job and, if they could not perform the essential functions, Baltimore City must make a reasonable accommodation.

Baltimore City determined that a full duty officer must be capable of making forcible arrests, driving a motor

vehicle under emergency conditions, and firing a weapon. The Department viewed these functions as essential because of fundamental "public and officer safety" concerns.

The officers failed to challenge critical evidence related to determining essential functions of the position – 1) the three core duties - making forcible arrests, driving a motor vehicle under emergency conditions, and firing a weapon; 2) the mandatory retirement policy in its collective bargaining agreement; and 3) the Department requirement that all officers, even those in supervisory and administrative roles, be capable for full deployment.

Instead, the officers limited their challenge to requesting the court to allow them discovery. The officers asked the court for an opportunity to determine the number of officers who actually make forcible arrests, drive under emergency conditions, and fire weapons. The Court rejected this request, reasoning that the issue is whether the officers are capable of performing these essential functions, not whether they have, in fact, been required to do so. The officers also asked the court for an opportunity to obtain job descriptions. Again, the court rejected this request, reasoning that the job descriptions would not abrogate the Police Department's authority to determine fundamental job duties and direct the Department. If an officer cannot perform these essential functions, Baltimore City may require the employee to separate from employment through retirement or involuntary resignation without violating the ADA.

The ADA requires an employer to make "reasonable accommodations" to the known physical or mental limitations of a qualified disabled individual, unless the accommodation would impose an undue hardship. Federal regulations provide that a "reasonable accommodation" may include job restructuring, modified work schedule, reassignment to a vacant position, and acquisition or modification of equipment.

The police officers asked Baltimore City to accommodate them by allowing them to continue in their permanent, light duty positions. The District Court flatly rejected the officer's request, reasoning that

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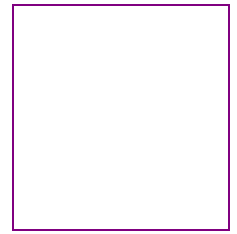
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ADDRESS CORRECTION REQUESTED

Promise

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that Holloman waived her right to a jury trial by signing an arbitration agreement, and the arbitration of statutory claims does not result in the forfeiture of substantive statutory rights.

County contracts are enforceable if they include an offer, acceptance, consideration, and mutual assent. This includes an agreement to arbitrate, or to proceed to a quasi-judicial process, instead of going to court to resolve a dispute. ❖

LaTia Holloman v. Circuit City Stores, Inc., Court of Appeals, No. 53, September Term, 2005 (March 13, 2006).

“Essential Functions”

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permanent, light-duty is not a reasonable accommodation because it would eliminate the essential functions of a police officer position – making arrests, driving a vehicle in an emergency, and firing a weapon. The police officer must be qualified in all respects to function as a full duty line officer. Accordingly, a reasonable accommodation must not eliminate a job’s essential functions. ❖

Steven Allen, et al., v. Leonard Hamm, et al., 2006 U.S. Dist. LEXIS 6707.